

COMPARATIVE ANALYSIS OF PREGNANCY ACCOMMODATION LAWS AMONG STATES

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ABSTRACT

Comparative Analysis of Pregnancy Accommodation Laws Among States (Under the direction of Dr. Melissa Bass)

Pregnancy accommodations refer to changes in the workplace or the way a job is typically done that allows an equal employment opportunity to a pregnant individual. Twenty-three states and Washington, D.C. have enacted pregnancy accommodation laws or requirements. Through documentary analysis of the state laws and surrounding literature, I compare the state laws to one another and the issue of pregnancy accommodations is discussed. The United States needs a national or uniform pregnancy accommodation law to equally protect pregnant women from job loss, wage loss, hazards to their pregnancy, and other forms of discrimination. In addition, companies and employers benefit from uniform pregnancy accommodation laws due to fewer lawsuits, including expensive legal expenses and time, and ease of creating policies and procedures. The current state and federal laws' insufficiencies are due to small scope of coverage. The problems are reinforced through increasing case numbers, increasing number of state laws, and literature on women's experiences. I compare the state laws on pregnancy accommodation in order to give a policy recommendation on the feasible ways to address the problem of failure in protecting pregnant women in the workplace due to lack of accommodation laws. I recommend the adoption by all states of the model law proposed to ensure equal access for pregnancy accommodation.

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Chapter I: Introduction

Women have joined the workforce in increasing numbers over the past century, and according to Pew Research, as of 2017, 46.8% of the American workforce is comprised of women (Geiger & Parker, 2018). Women's roles in the workplace have expanded over the past century, and job opportunities in many fields have opened to increasing numbers of women allowing them to both work and have families. An example of this growth is seen in a 2018 Congressional Research Service report stating that women made up 20 percent of the United States Congress in 2018, holding 107 of the 535 seats compared to just 64 seats in 1998 (Feder). In 2017, there were 74.6 million women in the American civilian labor force, where women held positions from CEOs in Fortune 500 companies to janitors at local schools (DeWolf, 2017). Not only are women working more, they are also working while raising children. According to the Department of Labor's 2017 report, "70 percent of mothers with children under 18 participate in the labor force, with over 75 percent employed full-time," and "Mothers are the primary or sole earners for 40 percent of households with children under 18, today, compared with 11 percent in 1960" (DeWolf). These statistics show the large impact working women have on their family's economic success as well as the evolution from stay at home mothers to working mothers in the United States' workforce. In 2016, the Bureau of Labor Statistics found that 61.1% of parents with children under 18 were both employed, showing some women with families are now choosing to work in addition to their husbands and not solely out of necessity (*The Economics Daily*, 2017). This change in the

United States of women more frequently participating and having larger roles in the workforce reinforces the need for laws protecting pregnant women at work.

While elite career opportunities have been opened to some women, many do not have the luxury of a high salaried job. According to the National Women Law Center's 2017 report on women's wages, two-thirds of the 23 million low wage workers in the United States are women, and many low income jobs include physical labor (Low-wage Jobs Archives). Jobs requiring physical labor from standing at a cash register to stocking shelves can be challenging for many pregnant women. According to the Center for Disease Control (CDC), physical demands at work such as "heavy lifting, standing for long periods of time, or bending a lot during pregnancy could increase the chance of miscarriage, preterm birth or injury during pregnancy" ("CDC-Reproductive Health", 2017). While pregnancy accommodations are needed by all types of workers, low-income workers are disproportionately affected due to more physically strenuous jobs and lack of additional benefits and bargaining power that are typically associated with high paying career. Pisko adds that "Accommodation laws are particularly vital for women of lesser socio-economic status, who are often living paycheck-to-paycheck and do not have the means or ability to take pregnancy leave" (2016). Low income pregnant workers with jobs involving physical labor often require accommodations at work in order to continue working during their pregnancy.

Women in the American workforce constantly balance raising families, breaking into fields typically dominated by men, and suffering from low-income work, and then many of them add pregnancy to this list at some point during their career. According to National Partnership for Women and Families, "75% of women in the workforce will

become pregnant at least once during their years of employment” (DeWolf, 2017). Often times pregnancy rights are overlooked even by women themselves, because they only seem important when one is pregnant (Deardorff, 2016). The reality is most women will need these protections during their career. Because pregnancy in the workplace will affect so many women over their lifetimes, pregnancy discrimination in the workforce continues to be an area of law which legal scholars should reevaluate and study frequently in order to determine if women have full protection and if not, fight for women to have it.

Laws have advanced since the time when women could be fired for being pregnant without any penalty, but negative views of pregnancy in the workplace still exist today and are seen through cases over the 21st century. In 1978 the Pregnancy Discrimination Act was enacted as a federal law to combat pregnancy discrimination on a national level, yet discrimination based on pregnancy continues to be an issue in modern civil rights law. Issues surrounding pregnancy discrimination include accommodations, maternity leave compensation, job security, job seniority, and insurance and other benefits protection. These issues remain because the Pregnancy Discrimination Act does not grant women full protection in the workplace from anti-pregnancy attitudes and behaviors from superiors. Two major failings in the area of pregnancy in the workplace remain. The first is the low standard of maternity leave required by American businesses. Currently the Family and Medical Leave Act guarantees only twelve weeks of unpaid leave for new parents who work for qualifying employers. The second is the Pregnancy Discrimination Act’s lack of detail and vague requirements for workplace accommodations employers must provide. This research focuses on pregnancy

accommodations in the workplace. A wide range of PDA interpretations since its beginning has led to complications in determining the legal responsibility of employers. Without specific and easily identifiable directives from federal laws, employers and employees lack information and accountability. These shortcomings affect women from all backgrounds and geographic locations making this a true national problem. According to the Equal Employment Opportunity Commission (EEOC), during fiscal year 2015, “women filed more than 650 charges alleging they were not provided the reasonable workplace accommodations they needed” (*By the Numbers*, 2016). In addition, during 2017, “\$15 million in settlements were paid out for pregnancy discrimination charges filed with the EEOC, a similar figure to the amount paid in previous years” (Pregnancy Discrimination Charges). In response to the problems seen by the number of case filings and high settlements, states have taken it upon themselves to go beyond FMLA’s and PDA’s limited protections through state statutes. These statutes address maternity leave length and pay as well as define and require accommodations in order to hold employers more responsible for modifying the workplace for pregnant employees. It is worthwhile to examine the trends among states regarding how to address these problems in order to extrapolate a working model that the could be applicable to the entire country.

This thesis will primarily serve as a comparative analysis of state statutes requiring accommodations by employers for pregnant women. Throughout the chapters, I use documentary analysis of both primary and secondary sources such as cases, academic studies, legislative history, and proposed and enacted laws on the federal and state level. The academic studies include think tank reports, advocacy reports, and statistics from the Bureau of Labor Statistics. I begin by investigating other scholars’ work on pregnancy

accommodations as well as areas related to pregnancy accommodation with a comprehensive literature review. While informative, they fail to explain how current state statutes regarding pregnancy accommodations compare to one another and what policy recommendations can be derived from their comparison to better protect pregnant women in the workforce. So I use the remaining chapters of the thesis to answer those questions. To provide context, I briefly examine the Pregnancy Discrimination Act, which is the current federal protection for women relating to accommodations, including the most recent Supreme Court analysis. Next, I analyze the state statutes in detail as well as compare them to one another in regards to protections offered and effects of differing language. Then, I discuss disagreement on the problem as well as potential solutions, including their current feasibility and likelihood of success. My main findings include similarities and differences among the state laws in language and amount of detail leading to different levels of protection. This includes requiring reasonable accommodations to pregnant workers among businesses with different numbers of employees, unless undue hardship exists, sometimes requiring the employer and employee to engage in an interactive process. An interactive process refers to at least one discussion, between the employer and employee, of the situation and possible options. In addition, many of the laws contain explicit definitions and examples to further aid employers and employees in understanding and adhering to the law.

Chapter II: Literature Review

The majority of state pregnancy accommodation laws have been passed in the last five years and no law exists for pregnancy accommodation on the federal level; therefore, an overview of related literature proves to be essential. Studies in areas such as the evolution of working mothers, the impacts of pregnancy discrimination, and overviews of feminist legal theory allow one to understand both the previous and current debates of civil rights legislation relating to women. Law review articles detailing the Pregnancy Discrimination Act's coverage and different interpretations based on court cases provide examples of legal scholars' response to the ever-changing focus towards better protections for women in the United States. This literature review details pregnancy accommodation discussions in addition to other areas of study to provide a large picture view of these issues.

Women in the Workplace

Blau and Kahn analyze women's labor force in their article "Female Labor Supply: Why is the United States Falling Behind?" (2013). Comparing U.S. male and female labor force participation rates (LFPRs) in 1990 and 2010 to other countries with similar stable economies shows the effect of labor policies. The gender gap in LFPRs fell in both the United States and other countries, but the gap fell by almost triple the percentage points for other countries. While many factors affect this difference, most countries' mandated pay during parental leave influences the number of women in the workforce most greatly. Another influence is the child care publicly provided in many

countries outside of the United States, which allows women to stay in the workforce rather than weigh the high costs of child care. In conclusion, the article shows how family-friendly policies lead to higher rates of participation overall, although the United States has higher percentage of women in management and executive jobs. Through this study, policymakers can see the positive and negative labor force outcomes of family-friendly policies, since both types of outcomes are important to consider when creating new laws. While my focus will be on domestic policies and their impacts, starting with a broad consideration of the benefits family-friendly policies can have on workforces internationally provides a good starting point in assessing the need for more pregnancy protections for American workers.

Correll, Benard, and Paik's article "Getting a Job: Is There a Motherhood Penalty?" shows a motherhood penalty exists (2007). When potential employees' qualifications and background were held constant and only their parental status changed, employers discriminated against mothers in hiring and salary decisions. The study found "mothers were judged as significantly less competent and committed than women without children." While mothers faced discrimination, the opposite was seen for fathers, who were seen more favorably by employers. The scope of this study is limited in that it analyzed high status jobs requiring high levels of commitment, so it cannot say for sure if the results would be similar for lower-status jobs. Despite this limitation, the results show discrimination against mothers still exists in the workforce. When discussing pregnancy in the workplace it is important to understand the dynamics and their effects for women at work including how employers respond to motherhood in a workplace environment.

“Breadwinning Mothers, Then and Now” (2014) by Sarah Jane Glynn describes trends in mothers in the workforce by comparing married mother breadwinners, single mother breadwinners, married mother co-breadwinners, and married mothers with zero earnings across different income quintiles, races, ages, and education levels to provide a broad picture of mothers’ income impacts. Breadwinners are defined as “bringing in at least half of family earnings,” and co-breadwinners as bringing home “between 25 percent and 49 percent of earnings.” In 2012 the study found “40.9 percent of mothers were primary breadwinners” and “22.4 percent were co-breadwinners.” These discoveries led to the authors argument that an update in labor standards and family-friendly federal policies is necessary to support working mothers and allow them to reach their full potential. The study was first done in 2009 and then replicated in 2012, which showed a stable increase in women in the labor force. This study shows women now provide economically to their family whether as the sole provider or co-provider in increasing numbers. Thus, it can be used to show the need for more pregnancy protections so women can continue providing for their families during and after pregnancy.

In 2003, Joan Williams published “Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job” in *Harvard Women’s Law Journal*. The maternal wall on which she focuses “arises at one of three points: when a woman gets pregnant; when she becomes a mother; or when she begins working either part-time or on a flexible work arrangement.” Both men and women are affected by the maternal wall. This article discusses the maternal wall’s legal and environmental implications on a workplace. The author strives to inform both lawyers fighting for clients who have suffered due to the maternal wall and lawyers on the management side

creating and enforcing company policies regarding pregnancy and caregivers. The author argues for the need for “workplaces that are truly responsive for caregivers needs” whether male or female. She states, “the question is whether workplaces will continue to be designed around the bodies and life patterns of men, with ‘accommodations’ offered to women, or whether workplace norms will be redesigned to take into account the reproductive biology and social roles of women and family.” Ultimately, she believes “true equality requires new norms that take into account the characteristics-both social and biological- of women.” In her analysis of pregnancy discrimination, she examines literature on workplace stereotypes and surveys successful cases involving family caregivers. The article provides insight into the maternal wall theory as well as Williams’ belief that workplaces should strive to eliminate gender roles to provide equality in the workplace. The hope is that well informed, thoughtful laws and company policies upfront can prevent employees from hitting the maternal wall and save employers money on lawsuits.

Pregnancy Discrimination

Recent *New York Times* reports by Natalie Kitroeff and Jessica Silver-Greenberg discuss issues surrounding pregnancy discrimination and specifically pregnancy accommodations in order to highlight problems American women face in the current workplace. The first article, titled “Pregnancy Discrimination is Rampant Inside America’s Biggest Companies,” shows the types of discrimination faced by women working competitive corporate careers such as on Wall Street versus women with low-income jobs like those at Walmart (2018). Interviews detailing women’s personal experiences and comments from legal scholars are used to describe these differences.

High earning pregnant women are often passed over for important projects which are often needed for promotion and salary increases. They are also left out of important meetings and presentations. Low income workers with manual labor jobs are often unable to receive workplace accommodations. The lack of accommodations affects their medical benefits and income because they frequently have to take unpaid leave or quit working completely. Both groups of women face discrimination in their particular environment and both suffer negative consequences as a result. The article reaffirms the idea that, while low-income women may face discrimination that is more life-threatening, pregnant women from all income brackets and career types experience workplace discrimination. The widespread impact of pregnancy discrimination on all types of women discussed in these articles shows the prevalence of this problem in today's workplace on a national level.

The second article titled "Miscarrying at Work: The Physical Toll of Pregnancy Discrimination" discusses the horrors low income pregnant workers face in a particular warehouse facility outside of Memphis, TN, with national implications (2018). The *New York Times* investigated the warehouse through visiting, interviewing past and current workers, and receiving statements from the managers' lawyers. The women workers shared a common story: excited to be pregnant, their doctors prescribed accommodations to protect their pregnancies due to their physically demanding jobs. These accommodations were denied and many women had to continue to do dangerous work due to inability to go without income, which led to fainting and miscarrying during work. While this story is not typical, it emphasizes an extreme case of adverse affects surrounding lack of pregnancy accommodations. This story shocks readers into

recognizing the problem exists in America, sometimes to the extreme nature described and other times in subtler ways. Through capturing attention, the authors hope to raise national awareness. Federal laws are needed because many states lack specific accommodation laws; therefore, employers in those states are only required to treat all employees equally. Essentially, employers can legally treat pregnant women poorly if they treat all employees poorly. This article provides reasons for needing more protections and gives real life examples of problems faced by low income working women.

Whether in response to the *New York Times* article or not, following the first article's release discussing pregnant women who are fired, refused accommodations, passed over for promotions, and even demoted, New York Governor Andrew Cuomo announced an investigation, led by the Division of Human Rights, into pregnancy discrimination at several major companies in his state. Cuomo also launched an education and outreach campaign directed by the Department of Labor and Workers' Compensation Board. This was done to make employees aware of their rights and employers aware of their responsibilities in order to prevent unlawful pregnancy discrimination. He stated, "New York leads the nation in advancing equal rights, and these actions will build on our proud record to help ensure women have equal opportunities to succeed in the workplace" ("Governor Cuomo Announces Investigation," 2018). Cuomo hopes these efforts will make New York a "safer and stronger state for all." The campaign focuses on multilingual subway ads and an accessible webpage detailing "the state law, rights of employees, and responsibilities of employers" in order to address lack of understanding by all parties involved. Later in the year, Governor Cuomo issued another statement

saying the investigation and campaign were in full force and would continue, with additional focus on retaliation women have been facing. This investigation shows the problem is being recognized by policy leaders and efforts are being made in some states.

The *Atlantic* article “Everyone Cares about Pregnancy Discrimination” by Ashley Fetters discusses how different sides of the political spectrum can team up against a common enemy: pregnancy discrimination including its many effects on Americans (2018). The article elaborates on the two viewpoints in order to show how they intersect in support of more protections for pregnant women. The author describes this comradery over pregnancy discrimination as dating back to the passage of the Pregnancy Discrimination Act. She points to left-leaning groups as paving the way and opening people to the idea and right-leaning groups as pushing it through to get it passed. Feminist and anti-abortion groups alike attended meetings to discuss the best ways to end pregnancy discrimination in the 1970s, when businesses told pregnant employees abortion was an option and then discriminated against them when they made a different choice. While the two groups’ reasoning differs greatly they chose to look past that in order to fight for the common goal. Pro-women’s rights groups hope women never have to choose between family and job and are protected in their jobs. Anti-abortion groups care about right to life and self-supporting families with jobs who do not need welfare. Lenora Lapidus, the director of the ACLU’s Women’s Rights Project discusses the importance of continuing to have working relationships with many different right-to-life groups. This article elaborates on the groups championing new anti-discrimination policies and why they can agree on this topic despite their opposing ideologies.

Pregnancy Discrimination Legal Analysis

“Relational Power, Legitimation, and Pregnancy Discrimination” by Byron and Roscigno analyzes 85 cases of pregnancy discrimination filed in Ohio between 1986 to 2003 (2014). The study utilizes both quantitative and qualitative data to answer first how non-pregnancy based firing discrimination compares to pregnancy specific charges and second the main legitimation strategies used by employers and plaintiffs’ responses to them. They discovered that the pregnancy plaintiffs tended to be younger and held less workplace seniority, and that employers used poor performance, poor attendance, and employee quitting as legitimation strategies. The results demonstrate the authors’ theory that “cultural and structural power disparities are reinforced by the culturally resonant strategies employers invoke in pregnancy discrimination disputes.” The study and its results provide a good example of academic research discussing pregnancy discrimination by giving more information on the people filing these cases as well as the employers’ responses.

“Special Delivery: Pushing for Pregnant Workers’ Fairness Rights” by Renee Chacko discusses the recent climate on pregnancy in the workplace, as it was published in 2017. Specifically, through case examples and state statute descriptions, it argues for increased measures to protect pregnant women’s rights on a national level. According to the author the Pregnancy Discrimination Act fails to adequately protect pregnant women, because it does not require the employer to “prove undue hardship to its business nor make reasonable accommodations for a pregnant worker not injured from work activities.” Chacko believes workers’ fairness rights acts within the states have been beneficial but that a uniform standard needs to be created through a new federal law. The fairness acts, although differing among states, mainly require an employer to prove an

accommodation “affects the costs or operation of its business” in order to deny it.

Currently pregnant women are filing court cases in some states where they are not owed any accommodation. A standard federal law would not only protect women but also set clean guidelines for employers in order to protect them as well. The study shows through case analysis the need for workers’ fairness rights in all states, which is an argument many legal scholars today share regarding pregnancy discrimination. The author’s legal expertise on the topic adds credibility to the state laws’ analysis and the recommendation that pregnant women in all states need accommodation laws.

“Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination” (2018) by Katzenbach was written as the PDA turned forty. It serves as a law review article detailing the progression of pregnancy discrimination law through PDA interpretations relating to comparisons and social perceptions. It analyzes “pregnancy discrimination claims within disparate-treatment and disparate-impact frameworks.” The discoveries include the evolving social perceptions of women in the workplace which are not yet reflected in the federal laws, as seen through workers’ impatience with federal courts’ narrow interpretation of the PDA. The many state statutes passed “signal the growing belief that working women have a right to hang onto their jobs when they become mothers, and that their income is crucial to a family’s survival.” In explaining narrow interpretations of federal law and increased numbers of state statutes, the article shows the limitations workers suffer from pregnancy discrimination. Because the article was written recently by a legal scholar, it provides a reliable reference to reinforce similar ideas on the topic of current issues in pregnancy discrimination discussed later in the thesis.

The book *Pregnancy Discrimination and the American Worker* by Michelle Deardorff and James G. Dahl provides a detailed legal overview of pregnancy discrimination in the United States (2016). Specifically, it discusses how courts have addressed pregnancy through the federal Pregnancy Discrimination Act and the Americans with Disabilities Act and answers the question “How does one discrimination law treat pregnancy with neutrality while another treats pregnancy as a disability warranting accommodation?” The authors’ goal is to situate where pregnancy discrimination was at the time they wrote the book and what that means to employees, employers, and lawyers. In reaching that goal, the authors review the historical context of pregnancy discrimination, formal and substantive equality, litigation under the PDA and the ADA, Title VII, and emerging issues. They conclude by saying, “The law has provided a set of piecemeal strategies that has recognized the places where gender differences truly do matter but has not resolved the conflict.” The book describes the problems including how some have been resolved, but ends with the message that pregnancy discrimination remains a problem for employees and employers. This source describes pregnancy discrimination in the United States, providing information on its many legal factors to show the challenges and complexities that still exist.

“The Pregnancy Discrimination Act and the Supreme Court: A Legal Analysis of *Young v. United Parcel Service*” by legislative attorney Jody Feder discusses the Pregnancy Discrimination Act including its history and the most recent Supreme Court case of *Young v. UPS* (2015). The study answers the question of how the PDA will be interpreted post *Young v. UPS* through analysis of the background and case to predict implications and a potential legislative response. The implications are that the “ruling

preserves the ability of pregnant workers to sue under the PDA when an employer refuses to accommodate pregnancy-related disabilities, but does not require employers to automatically provide accommodations under all circumstances.” The author determined that the Pregnant Workers Fairness Act (PWFA) was the most direct legislative response to *Young v. UPS*, but based on the current federal political climate it is not likely to be passed soon. Currently the PDA requires accommodations to pregnant women if the employer accommodates other similarly situated employees, and the PWFA goes further to require accommodations unless undue hardship. The Supreme Court’s most recent ruling shows how the courts currently interpret the PDA and how this will affect future litigation and employer responsibilities. Although the *Young v. UPS* ruling gave more insight into the PDA coverage available, it still lacks clear language on the responsibilities of employers, leading to confusion.

Medical Positions

Prominent medical organizations, including the American College of Obstetricians and Gynecologists (ACOG) have issued statements and guidelines regarding pregnancy accommodations. According to the committee opinion on considerations written in 2018, during pregnancy obstetrician-gynecologists can help patients understand and receive possible work modifications or accommodations when needed. It states, “for those in high-risk occupations or with medically complicated pregnancies, work accommodations often can allow for continued safe employment.” The quote reinforces the idea that not all pregnant women need accommodations but for those who do, they can make a major impact. The ACOG statement urges medical professionals to learn the many different options for their patients due to the complexities

and variances of policies from state to state. In addition to describing how doctors can inform patients about their options, the statement details how to write an effective work accommodation note. It emphasizes that an effective note can make the difference between a patient receiving an accommodation or not. This medical perspective provides insight to the issue from a new angle and highlights the intersection between healthcare and policy on the topic. It shows physicians' views on accommodations in the workplace during pregnancy and their involvement in the relationship between pregnancy and physically demanding jobs.

The Centers for Disease Control and Prevention published the National Institute for Occupational Safety and Health's information on reproductive health and the workplace in 2017. The article focuses on physical demands such as lifting, standing, or bending. It states, "Heavy lifting, standing for long periods of time, or bending a lot during pregnancy could increase your chances of miscarriage, preterm birth, or injury during pregnancy." The article describes physical demands including what they are, why they matter, what jobs typically have them, and how to reduce or eliminate exposure to them. According to the information "pregnant women are at a higher risk of injury while lifting due to differences in posture, balance, and ability to hold things close to the body because of their [sic] changing size." Reducing or avoiding lifting heavy objects, standing for a long time or bending can reduce harm as well as discussing accommodations with one's doctor. While written to provide more information to pregnant women, the article also helps to educate employers on workplace concerns. The discussion of pregnancy hazards in physically demanding jobs by widely recognized sources supports the need for continued discussion and awareness on the topic to insure safe working environments.

Women in the Law

The rights of women in the United States have greatly evolved since women gained the right to vote in 1919. Through the right to vote women won a voice and leverage in fighting for their policy interests. *Introduction to Feminist Legal Theory* (2003) by Martha Chamallas and *A Primer Feminist Legal Theory* (2006) by Nancy Levit and Robert R.M. Verchick provide a survey of American feminist legal theory from its first known beginnings in the early 1800s. They serve as references for key vocabulary, concepts, debates, and movements in order to better understand the history and evolution regarding women's legal rights in the United States. Chamallas highlights the theme of "women's experience" as a grounding principle of feminist legal theory. Through analyzing the everyday experience women are able to see the laws' effects on them and work to better their situations. She states, this emphasis is "especially useful to identify exclusions in the law" in order to recognize new reasons for action. These books depict feminist legal theory as containing many actors and interests rather than a united bloc. Both books allow for a comprehensive understanding of feminist legal theory in order to understand how issues become priorities and lead to change in the legislature and courts. Neither books mention pregnancy accommodations as this topic remains a newer priority on the national level, but both have extensive chapters on women in the workplace which discuss conflicts in balancing work and family.

Gender, Race, and Ethnicity in the Workplace: Emerging Issues and Enduring Challenges by Margaret Karsten includes a section on "Work and Family Issues" (2016). Many experts contribute to the discussion which details workplace inequalities through perspectives on current challenges and effects of past advancements. This portion of the

book begins by posing the question “Is pregnancy a disability?” and throughout the chapter it analyzes how pregnancy has been treated during different times in history, how it is treated now, and what that means for employees and employers. Karsten states “The piecemeal approach of legislation addressing pregnancy in the workplace results in such gaps and complicated workplace impasses.” The quote emphasizes the difficulty in understanding the legality of certain actions regarding pregnant workers due to multiple relevant laws without specific direction leading to differing and vague court interpretations. After detailing the interactions between pregnant workers and the multiple federal laws that involve them, she concludes with “when it comes to pregnancy, its complicated.” This confusion among scholars, employers, and employees reinforces the need for clear pregnancy accommodation laws. Karsten’s book serves as one of the few published books available in 2019 detailing pregnancy accommodations in the workplace.

Conclusion

The literature within the areas of pregnancy discrimination, women in the workforce, women in the law, medical roles, and more come together to explain the lack of adequate pregnancy accommodation laws. Because the discussion of pregnancy accommodation is fairly new on the national level, studies and books do not focus on all aspects of the issue; therefore, one must look at the many pieces of the problem to fully understand it. These pieces include doctors’ functions, changes in women’s roles in the workplace, legal theory, and recent investigative articles. To summarize, women’s roles have expanded due to increased opportunity and legal protection, yet discrimination remains especially in the area of pregnancy accommodation. This discrimination exists

despite the laws that have been passed in multiple areas to promote women's accessibility to the workforce and equality within the workforce. This literature review gives the reader background information on pregnancy in the workplace before getting into the details of specific laws, while also providing valuable supporting evidence from scholars' works for the policy recommendations at the conclusion of this thesis.

Chapter III: Pregnancy Discrimination Act

The Pregnancy Discrimination Act, or PDA, was designed to combat the problems pregnant women faced and protect future pregnant women in the workplace; however, despite good intentions, the PDA does not fully protect working pregnant women. The PDA was passed by Congress in 1978 as an amendment to Title VII of the Civil Rights Act of 1964, in response to *General Electric Company v. Gilbert* (Deardorff, 2016). In the Gilbert case, the Supreme Court upheld the practice of denying pregnant female employees disability benefits offered to other employees for non-occupational sickness and accidents by saying pregnancy did not fall under Title VII's discrimination on the basis of sex. The PDA was created to overrule the Gilbert decision by declaring pregnancy discrimination a form of sex discrimination, which in turn makes discrimination by employers on the basis of pregnancy illegal. Its reach includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions" (Pregnancy Discrimination Act). While the PDA was a valuable addition to Title VII, forty years later this one-page federal law lacks necessary detail specifically regarding accommodations, because it says nothing beyond that it is illegal for employers with 15 or more employees to discriminate due to pregnancy in the workforce. Congress made it unlawful for employers to discriminate against pregnant women, but it has been the Supreme Court's interpretations of the PDA as well as the Equal Employment Opportunity Commission's guidelines on pregnancy in the workplace that have led to the evolution of unclear of standards.

Justice Thurgood Marshall wrote the majority opinion in *California Federal Savings and Loan v. Guerra* which served as the first case in front of the Supreme Court interpreting the PDA (Deardorff, 2016). The question posed was whether the PDA overturned a California state statute requiring pregnant employees to be given leave and guaranteed reinstatement. Justice Marshall's opinion stated the importance of congressional intent in passage of the PDA and concluded that Congress intended the PDA "to be a floor beneath which pregnancy disability may not drop- not a ceiling above which they may not rise" (Deardorff, 2016). As a result, the Supreme Court ruled that states may go beyond the PDA in their statutes as long as they do not operate with standards below the PDA. Other Supreme Court cases involving the PDA found that states cannot deny unemployment compensation on the basis of pregnancy or termination of pregnancy, that companies cannot discriminate based on the potential to become pregnant, and that current effects of maternity leave taken before the PDA was passed are not covered under the PDA (Deardorff, 2016).

The most recent high profile case involving the PDA, *Young v. UPS*, was argued before the United States Supreme Court in 2015. Young delivered packages for UPS and during her pregnancy was told by her physician that she could not lift more than 20 pounds. The UPS lifting requirement is 70 pounds, and Young's supervisor refused to give her a light-duty assignment that other employees were given (Feder, 2015). The PDA states that pregnant workers are to be treated "as other persons not so affected but similar in their ability or inability to work." The vagueness in wording of this phrase has allowed employers to claim pregnancy blind policies too often which leads to many cases such as Young's. The Supreme Court sent the case back to a lower court in a ruling that

gave a new interpretation of the PDA, saying “a pregnant employee can establish that a ‘significant burden’ exists if she can demonstrate that an employer provides accommodations to a large percentage of non-pregnant workers but denies such accommodations to a large percentage of pregnant workers” (Feder, 2015). This new interpretation means that employers violate the PDA if they accommodate some workers but deny the same accommodation to pregnant women, even if the accommodation has also been denied to other non-pregnant employees. While it was discovered UPS was in the wrong in this case, the new interpretation does not provide adequate criteria for other employers and leaves too much room for employers to claim pregnancy-blind practices. Because specific, understandable regulations have not been made nationally, similar cases continue to be filed.

The Equal Employment Opportunity Commission (EEOC) was created by Congress through Title VII of the Civil Rights Act of 1964 and serves to issue rules and regulations as well as investigate claims under Title VII (Overview, n.d.). It also provides “right to sue” letters for submitted complaints which allow plaintiffs to file claims in federal court. As judicial interpretations of the PDA have changed, the EEOC has updated its guidelines on the subject. Currently, the EEOC requires employers with fifteen or more employees to treat pregnant employees unable to perform their job due to a medical condition related to their pregnancy the same way the employer treats a temporarily disabled employee (Legal Rights for Pregnant Workers, n.d.). The intersection of the PDA and Americans with Disabilities Act (ADA) is explained and regulated by the EEOC, whereby pregnancy related medical conditions are covered disabilities and must be provided reasonable accommodations unless the

accommodations pose undue hardship, typically defined by significant difficulty or expense in regards to the particular employer (Legal Rights for Pregnant Workers, n.d.). According to the EEOC, “A reasonable accommodation is any change in the workplace or the way things are customarily done that provides an equal employment opportunity to an individual with a disability” (Procedures for Providing Reasonable Accommodation, n.d.). The federal government’s Pregnancy Discrimination Act has previously failed to provide enough protection for accommodating pregnant woman in the workplace despite new cases leading to updated precedent. To combat the failings of the PDA certain states have passed statutes to combat its problems at a state level. Yet pregnancy discrimination continues to occur in the United States’ workforce forty years post enactment of the PDA, because the PDA provides a low and unclear national minimum standard of protection for pregnant employees.

Chapter IV: State Laws

States and cities have responded to the Pregnancy Discrimination Act's flaws, including lack of protection due to vagueness, by enacting statutes to supplement the current federal protection of pregnancy accommodations. Twenty-three states, the District of Columbia, and four cities have passed a variety of laws mandating certain types of employers to provide reasonable accommodations to pregnant workers. Katzenbach stated in 2018, "the statutes signal the growing belief that working women have a right to hang onto their jobs when they become mothers, and that their income is crucial to a family's survival." They include a diverse scale of protections regarding type of employer, size of company, need for professional recommendation, and exceptions from the rule. The state laws regarding accommodations are organized in a chart in Appendix A and discussed below in detail to compare the many differences and similarities among them. The year passed as well as the ease of passage, as seen in Appendix A, highlight the advancement of pregnancy discrimination laws across the country over the past two decades and can be used to predict what the future holds for this area of law on a national level. The main findings include similarities and differences among the state laws in language and amount of detail leading to different levels of protection. These include requiring reasonable accommodations to pregnant workers among businesses with different numbers of employees unless undue hardship exists, sometimes requiring employer and employee to have engaged in an interactive process.

In addition, many of the laws contain explicit definitions and examples to further aid employers and employees in understanding and adhering to the law.

Among the state statutes providing accommodations for pregnant workers, the number of employees required in order for the law to be applicable differs. The laws range from the six states that hold all employers accountable to Louisiana which only requires companies with 25 or more employees to face requirements. Threshold variations among states are found in many labor laws across the country. The threshold numbers differ because typically more conservative states do not want to impose increased burdens on small companies, so they set higher thresholds, while the more liberal states with lower thresholds or no number requirement believe other language in the law combats potential increased burdens. In regards to the states whose pregnancy accommodation laws cover all employers, businesses with small staffs or specialized jobs are able to claim undue hardship when unable to accommodate pregnancy workers. The variation in number of employees required for a company to fall under its statute represents an important distinction by showing a lack of standardization and equal protection for employees even among the states with pregnancy accommodation laws. (See Appendix A)

A major similarity among almost every state law is the phrase “undue hardship,” which provides a way a company can refuse to accommodate pregnant women. It was created as a way for employers to prove they are unable to give an accommodation when that is the case, and it specifically benefits smaller companies or companies with specific roles. For example, say one owns a small granite business with two salespeople, an accountant, and two employees who cut and deliver granite, and a female employee who

cuts and delivers becomes pregnant and can no longer lift the granite. The employer may not have an alternative position or accommodation for her during her pregnancy due to the small size of the business and specific roles; therefore, an undue hardship exists for this business exempting it from required accommodations. Businesses should not take unnecessary advantage of the undue hardship exemption; it should only be used when unavoidable. For example, Walmart, the nation's largest employer, and one often receiving complaints regarding pregnancy discrimination, has little basis for arguing that it cannot give light duty work or move heavy lifters to cash register jobs for the duration of their pregnancy due to the many different positions within the company. Rhode Island's state statute specifically mentions a scenario where an employer provides similar accommodations to another class of employees saying this situation shall create a "rebuttable presumption that the accommodation does not impose an undue hardship on the employer." The burden of proving undue hardship is on the employer in all the state pregnancy accommodation laws except those in Alaska, Hawaii, Texas, and Louisiana. Louisiana provides that an employer is not required to create a new position or fire anyone, and Texas mandates work transfer if available. These differences in the burden of proof companies face in different states exemplifies a big area of potential confusion in legal practices among the states. While most state laws include "undue hardship" as a reason for exemption from the law for businesses that legitimately cannot feasibly provide an accommodation, some laws fail to have that phrase, and others do not provide an exact definition. (See Appendix A)

State laws provide different definitions and examples of many terms and phrases including how employers may claim undue hardship; specifically, they vary in the level

of detail provided. Some laws such as West Virginia's say "unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business," while others such as Colorado's go further to define undue hardship as "an action requiring significant difficulty or expense of the employer" and saying "where the following factors may be considered: the nature and cost of the accommodation; the overall financial resources of the employer; the overall size of the business with respect to the number of employees, and the number, type, and location of the available facilities; and the accommodation's effect on expenses and resources or its effect upon the operations of the employer." Colorado's law also states that if a business is required or acting to provide similar accommodations to other classes of employees, it is fair to presume they do not cause undue hardship. The law states, "The employer's provision of, or a requirement that the employer provide, a similar accommodation to other classes of employees creates a rebuttable presumption that the accommodation does not impose an undue hardship." It is important to note that a business cannot simply claim undue hardship in response to a discrimination suit, they must also be able to prove it in a court of law. Not only do state laws' definitions differ in length they also differ in language which is very important in legal proceedings. Some state laws still fail to provide any specific definitions leaving phrases such as "undue hardship" and others up to interpretation. These differences in thoroughness and definition of an undue hardship requirement within different state laws exemplify the confusion among these laws making it difficult for large companies to comply with different state policies. Walmart for example constantly changes its pregnancy accommodation policies due to new standards with each state law enactment (Brafman, 2018). (See Appendix A)

Two states, Texas and Alaska, only protect public employees in their pregnancy accommodation laws. Texas uses the term “pregnancy accommodation,” and Alaska only covers transfer of jobs. “Public employees” refers to all government workers including those in public institutions, law enforcement, and those employed by the local, state, or federal government. Alaska’s law providing the transfer of jobs only goes into effect if a position is available in the same administrative division. Texas’s law on temporary work assignment only includes movement to another position in the same office. It defines an office as “a municipal or county office, department, division, program, commission, bureau, board committee, or similar entity.” These laws are extremely limited due to availability of transfer positions and the lack of other types of accommodations pregnant women may be provided. By only covering public employees, the Texas and Alaska laws fail to offer protections to large numbers of citizens working in the private sector. This lack of inclusion leaves out many vulnerable low income workers needing accommodations. Most of the accommodation laws cover public and private employees, and in doing so, they afford more protections to women from companies often facing charges. For example, Walmart and gas station employees, who are often refused accommodations, will not be legally entitled to them under Texas and Alaska’s laws unless they are given to other similarly situated employees. (See Appendix A)

A majority of the state accommodation laws for pregnant workers allow an employer to require a medical professional’s note detailing the need for accommodation. These notes help to explain the accommodation, often including a description of what is needed and possible suggestions of other jobs that would work for the employee. Not all pregnancies need to be accommodated; therefore, an employee’s physician can advise

managers on the need for and type of accommodation. Some advocates believe doctors' notes may discourage those who need accommodations from asking due to lack of time or money to visit a doctor. Despite the concern, a medical professional's advice can be very beneficial to the accommodation process (Women's Health Care Physicians, 2018). Washington, D.C.'s law states "An employer may require an employee to provide a certification from the employee's health care provider concerning the medical advisability of a reasonable accommodation." It further details that, "Certification shall include: the date reasonable accommodation became or will become medically advisable, an explanatory statement as to the medical condition and the advisability of providing the reasonable accommodation in light of the condition, and the probable duration that the reasonable accommodation will need to be provided." Washington, D.C.'s law serves an example, similar to others, of a state law providing a thorough description of physician's advice. In contrast, Louisiana's law depicts a different format also found among the state laws. Louisiana's law states only "with the advice of a physician," referring to the ability of an employer to require a physician's note before providing accommodations. The state pregnancy accommodation laws of Connecticut, Delaware, Vermont, Hawaii, North Dakota, South Carolina, Rhode Island, and New York do not mention physicians' notes at all which leaves discretion to the employer. These differences in explicitness in what an employer can require of a pregnant employee seeking accommodation in regard to physician's note can allow an employer to claim a position most beneficial to them in legal proceedings. The wide range of state laws' treatment regarding a physician's note to confirm and describe medically needed accommodations for pregnant workers reinforces

problems with discrepancies among laws and vagueness in language within specific laws. (See Appendix A)

Utah and Washington's state accommodation laws go into more detail regarding physician's notes by both allowing an employer to require a certified professional's statement for some accommodations but not others. Utah's law allows physician's note requirement for advisability of accommodations excluding more frequent restroom, food, or water breaks. Washington's law allows a physician's note requirement for job restructuring, temporary transfer, and modifying schedule but not more frequent restroom, food, or water breaks. These two laws find a middle ground between the ability of an employer to require a physician's note for any accommodation and no specific details at all. By excluding restroom, food, and water breaks from needing notes, employees face fewer burdens in successfully receiving accommodations in their workplace and employers are given a more explicit rule to follow. The exclusions also represent minor activities unlikely to alter the daily workings of the company. These two laws with very similar medical professional rules still do not match up exactly, showing the big effects small differences like these can have on employment policies. (See Appendix A)

Many states require notice of pregnancy accommodation laws as well as changes to these laws. Employers in states such as Rhode Island, Vermont, South Carolina, and Nevada must post their state's pregnancy accommodation laws in the place of employment in addition to distributing them to new employees and putting them in the employee handbook. Rhode Island's law requires a "notice conspicuously posted at an employer's place of business in an area accessible to employees." Maryland's law

requires “an employer shall post in a conspicuous location.” The requirement of notice and especially of update to laws is important to keep employees fully informed, because of the many laws enacted in the last five years in addition to updates to older laws. Also, if women do not know about requirements for accommodations, they may fail to ask for them. These postings serve as another layer of accountability, because when workers are refused accommodations charges may be filed due to lack of awareness of the law.

Notice remains an important element in pregnancy accommodation laws in order to keep all parties aware of current laws. While many companies may automatically post updates to laws, language in the law that requires an update to employees serves as a re-enforcement on employers to post and a point either side can use to more quickly resolve a legal issue. As with many aspects of state laws, those that require notice do not require it all in the same way, leading to confusion among employers trying to follow the laws of each state. (See Appendix A)

The states’ many different pregnancy accommodation laws have the same goals and similar language but vary in regards to detail, explanation, and level of protection. In comparing these laws, the amount of detail is seen through examples and definitions included among major requirements. The increased detail through further explanations aids both employers and employees in better understanding the mandatory practices within each state. Illinois’ state law uses over half a page to provide explicit definitions of “reasonable accommodations” and “undue hardship,” including many examples of each key term. In contrast, Washington, D.C.’s pregnancy accommodation law does not include definitions or examples of either key term and is shorter than the definition and example Illinois provides for “reasonable accommodation” alone. Since Washington,

D.C.'s law actually does provide more protections than the average accommodation law, shorter laws do not necessarily mean less protection. However, Hawaii's three sentence law does not provide definitions, examples, or exceptions providing far less protection than states such as California and Massachusetts which provide great detail in order to guide employers and employees towards mutual understanding of the law. In addition to employers' and employees' understanding of the laws, explicitness also helps standardize court interpretations leading to less room for debate and solidification of rules. (See Appendix A)

States including Colorado, Connecticut, West Virginia, Nebraska, and many more include language in their pregnancy accommodation laws to prevent retaliation and differing treatment toward pregnant employees by employers. The main provisions state employers cannot take adverse action against, deny opportunities to, force leave of, or require accommodation to a pregnant employee due to need of a reasonable accommodation. By outlining the ways in which an employer or potential employer cannot respond to the request of a pregnancy accommodation, reassurance is given to the employee and they will be more comfortable requesting accommodations with these protections. The laws giving explicit guidance on how an employer may treat a woman after a pregnancy accommodation request also aid in creating a continued positive work environment. These preventive measures are included either exactly or through similar language in many other labor laws as well, such as the Americans with Disabilities Act. Although states' labor laws have retaliation clauses, this extra protection or reinforcement, in many but not all state pregnancy accommodation laws, prevents employers from further discriminating against pregnant employees who are exposed to

different types of discrimination. With the number of accommodation requests likely to increase due to an increasing number of laws, outlining how employers are legally required to respond remains beneficial, particularly to pregnancy accommodations which differ from other labor laws. (See Appendix A)

Some states such as Colorado, Massachusetts, Minnesota, and Nevada discuss within their accommodation laws the process in which employees and employers should work together to address the need of a pregnancy accommodation. Washington, D.C.'s law states, "an employer shall engage in a timely and interactive process with an employee requesting or otherwise needing a reasonable accommodation to determine a reasonable accommodation for that employee." Illinois' state statute adds they shall "engage in timely, good faith, and meaningful exchange." These descriptions of the manner in which communication should occur add another layer of protection to pregnant employees, because they are guaranteed discussion time and opportunity to work with the employer. Plaintiffs are then able to argue in court that there was a lack of communication and unwillingness to work to find a solution, if that is the case, to strengthen their claim in court. In addition to holding the employer accountable for common sense practices, this language mandating interaction can serve as a preventive measure before a situation escalates or charges are filed. While one may believe an interactive process would be a given when discussing accommodations, some state pregnancy accommodation laws have this language requiring and detailing an interactive process to provide further guidance for both parties and insure discussion occurs. (See Appendix A)

Over half of the pregnancy accommodation laws state that it is an unlawful employment practice “For an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant employee who so requires.” This commonly found statement among pregnancy accommodation laws provides a general rule that employers may be held accountable in these states for failing to provide pregnant employees the same treatment given to other groups of employees for differing reasons. Through this statement the standard of the employer rises to meet the capabilities of the business by saying what they do for some they must also do for pregnant women. This statement compares temporary disabilities to some pregnancies needing similar accommodations but does not consider pregnancies to be temporary disabilities. Relating pregnancy, especially medically difficult or high risks pregnancies, to a disability remains a debated topic that will be discussed in the next chapter, due to its relevance in creating future policy on pregnancy accommodations. The Americans with Disabilities Act (ADA) serves as a federal law protecting Americans with disabilities in many areas including within the workforce. Because the ADA has similar language to many state pregnancy accommodations laws, such as the requirement for reasonable accommodations unless undue hardship as well as closely related definitions of those terms, it can serve as another guide in creating a model accommodation law. Under the Americans with Disabilities Act employers are already obligated to provide accommodations to their disabled workers, so implementing standards in a separate law for pregnant women would be minimally difficult (Pisko, 2016). The similarities in language among

pregnancy accommodation laws and the ADA already exist, meaning employers are already accustomed to many of the same requirements on a national level which can facilitate addition of beneficial pregnancy accommodation laws for more uniform protection. (See Appendix A)

Some states, such as Colorado, do not have one specific pregnancy accommodation law; instead, they have multiple laws which all must be read in order to understand the entire legal condition of pregnancy accommodation in the state.

California, for example, has a definitions chapter which defines employer, reasonable accommodations, and undue hardship; an article detailing required notice of pregnancy accommodation laws; and an article detailing the rules of pregnancy accommodation in the state. Other states, such as New York, have their pregnancy accommodation law buried in an unlawful discriminatory practices statute which is over twenty pages long. Accommodation laws divided among multiple state laws or found in the middle of dense, all-encompassing workplace discrimination laws can lead to confusion among employers and employees trying to understand their rights and responsibilities. Therefore, specific state or federal laws discussing pregnancy accommodation such as Washington, D.C.'s Protecting Pregnant Workers Fairness Act of 2014 provide greater accessibility and understanding. (See Appendix A)

The states have a range of laws outlining their policies on pregnancy discrimination which go beyond the EEOC guidelines and the PDA's requirements of no discrimination on the basis of pregnancy and of requiring accommodations given to other temporarily disabled employees in places of employment with fifteen or more employees. Most of the state laws require reasonable accommodations unless undue hardship, and

some go further to define and provide examples of these terms. Many of the state laws mandate employers provide information to employees regarding the state's laws by posting it at the business location and sending written notice. Many states also allow an employer to require the pregnant employee requesting accommodation to submit documentation from her physician discussing medical needs. Some states require employees and employers engage in a timely, good faith, and interactive process to decide reasonable accommodations. States also differ in the number of employees, varying from one to twenty-five, necessary in order for the law to go into effect. In a few states, such as Alaska and Texas, the accommodation requirements only apply to public employees. While similarities exist among the current state laws, important differences affecting many employees are also seen, and twenty-seven states remain without any additional laws providing accommodations to pregnant employees. (See Appendix A)

Chapter V: Discussion and Policy Recommendation

Discussion of Need

Pregnancy accommodation needs in the workplace are realized by the increasing number of state statutes requiring them as well as other findings. The problem of pregnant employees failing to receive necessary accommodations from employers is seen through increases in cases and laws at the state and local level. According to the National Partnership for Women and Families, almost 31,000 pregnancy discrimination charges were filed between 2010 and 2015 with the EEOC. Among those charges, the two major categories were discharge and denial of accommodations due to pregnancy (By the Numbers, 2016). Beyond these 31,000 charges, many other women faced discrimination and did not pursue charges. In addition to the large numbers of cases filed, national stories published in the *New York Times* have detailed personal interviews with women suffering from discrimination, loss of income and insurance, and even miscarriage due to lack of adequate pregnancy accommodations (Kitroeff, 2018). These articles reveal the hardships faced by women in all job types from cashiers to Wall Street insiders who need pregnancy accommodations in different forms. Through these personal stories, we have come to recognize the insufficiencies of current federal protections of women. A need for universal or more similar pregnancy accommodation protection for the entire United States is seen through the large numbers of cases, the increasing number of state laws requiring accommodation, and stories detailing women's experiences when not provided pregnancy accommodations.

Not only pregnant women but also companies and employers experience difficulties due to lack of adequate pregnancy accommodation laws. The main problems faced by companies and employers are complications creating company policies as well as lawsuits costing time and money. Walmart, for example, changed its pregnancy policy nationwide in October 2017 to match many of the state laws which provide coverage beyond the Pregnancy Discrimination Act (Brafman, 2018). They are doing this to save themselves from more legal battles as well as to eliminate the confusion among their locations in different states. The new Walmart policy “allows employees who are pregnant, breastfeeding, or recovering from childbirth to ask for job adjustments, reasonable accommodations, and now, Temporary Alternative Duty” (Brafman, 2018). Temporary alternative duty refers to reassignment to a new position for a needed period and has previously only been granted to Walmart employees suffering on-the-job injuries. These options are available to full and part-time workers. Walmart states it will grant employees’ requests unless undue hardship exists, making it too difficult or expensive for the company, this would be hard to prove at a company like Walmart due to its size and many different types of jobs (Brafman, 2018). Walmart has faced many pregnancy discrimination suits due to its overall size and number of physical jobs, so it will be interesting to see how many other companies follow its lead in providing broader protections for women in response to the new state laws. Walmart’s policy change to provide more protection for pregnant employees demonstrates the need for uniformity and the burden on employers when laws differ by state and the national law remains vague.

As seen by over 31,000 pregnancy discrimination cases filed with the EEOC between 2010 and 2015, these cases occur frequently and often lead to lawsuits against companies of all sizes (By the Numbers, 2016). While companies will inevitably face some lawsuits, the high costs of legal fees and lengthy processes should make companies want to avoid these cases. Detailed pregnancy accommodation laws can lead to fewer cases due to their unambiguous requirements. With detailed laws requiring accommodations, employers can better understand their duty to pregnant employees. Good pregnancy accommodation laws can help employers retain valuable employees saving them time and money in hiring and training someone new. In addition, companies can even be forced to shut down by the government or through public opinion if discrimination warrants. The XPO Logistics distribution center in Memphis, Tennessee closed its doors after being highlighted in the *New York Times* for poor working conditions for pregnant women, leading to adverse health effects and miscarriages (Kitreoff, 2019). By providing clear standards for employers regarding pregnancy accommodations, employers benefit by not losing time and money over pregnancy accommodation lawsuits. If an employer follows the law's clear standards, he or she will prevail in court. If an employer does not follow them, a clear decision can be made against the employer, unlike the applicability of the vague Pregnancy Discrimination Act currently used in accommodation cases if the state does not have a law of its own. Both the employer and employee benefit from specific, protective laws on pregnancy accommodation saving each party from discrimination, time, and unnecessary costs.

Feminist Legal Theory Debate

Feminist legal theory is grounded in women's experience and often begins with the understanding there is problem in society where women hold subordinate positions (Chamallas, 2003). When problems grow, affecting large numbers of people, social movements can form at local, state, and national level leading to altered beliefs and/or policy. Feminists are often divided among themselves on the solution to many issues women face. During the early 1900s, divisions within the National Women's Party slowed the advancement of the 19th amendment, which gave women the right to vote (Woloch, 2017). As time progressed, feminists divided into groups based on how to combat women's disadvantages. Cultural feminists, for example, think "women's economic marginalization may result from their devotion to caregiving" and believe laws granting women special treatment should be created (Levit, 2006). In contrast, equal treatment feminists want gender neutral rules and think women will be perceived as less valuable or less capable workers if given special treatment (Levit, 2006). Dominance theorists work towards fundamental, structural reforms (Levit, 2006). The different opinions of how to address female discrimination in America, even among those who agree a practice or act is discriminatory, continue to exist leading to slower progress on national reform. "Disagreement among feminists over the goals themselves is far more common than unity" and when unity does occur among them feminists are usually successful (McBride, 2016). The women's movement has yet to agree "on a common way of thinking about the interrelationship between motherhood and work," with significant implications for pregnancy accommodations leading to a slower national policy implementation (McBride, 2016).

One debate is over whether or not to classify pregnancy as a temporary disability. “Generations of feminists have tried to reconcile biological differences with equality,” and these feminists typically favor using pregnancy and temporary disability interchangeably in order to create gender neutral laws (McBride, 2016). Others maintain “that pregnancy is a natural function, not a disability; it is private and usually voluntary,” and therefore, should not be considered any type of disability, even temporary (McBride, 2016). Good reasons exist for supporting either position on pregnancy classification leading to a continued divide on the topic further slowing down policy changes. Pregnant women who claim temporary disability will become covered under the Americans with Disabilities Act (ADA), and they will have much more protection than they currently do. This potential for the ADA to come into play with pregnancy accommodation laws, while beneficial in some ways, further adds to the complicated mix of state laws and the PDA. Employers are familiar with the ADA including its processes and requirements, because it has been in place for many years successfully protecting Americans with disabilities. Feminists wanting to classify pregnancy as a temporary disability under the ADA argue these reasons to easily and quickly provide more protections for pregnant women through the process of including pregnancy within the ADA as a temporary disability. The ADA itself is large and complex, and beyond the scope of this research, but we should acknowledge that one option for protecting pregnant women is to provide them with coverage through the ADA.

The alternative to providing protection for pregnant women under the ADA is to pass specific laws at the national level such as a pregnancy accommodation law. This is not a gender neutral solution because the law would only protect those who become

pregnant which only includes women. A pregnancy accommodation law would protect against problems pregnant female workers face. Although equal treatment feminists may disagree with the position for a federal pregnancy accommodation law because it singles out women due to their ability to become pregnant, it would recognize the discrimination pregnant women currently face and allow them to continue working through pregnancy. This remains a very different approach than classifying pregnancy as a temporary disability and looping it into the ADA. Siegel states, “pregnancy is neither a disability nor a dysfunction but a normal moment in the human reproductive process specific to women” (Karsten, 2016). Because classifying pregnancy as a temporary disability alludes to a problem with pregnancy, a better alternative exists in creating new federal laws specifically protecting pregnant women.

Policy Recommendation

To go beyond recognizing the problem to solving it, policymakers need to generate solutions and evaluate different alternatives to create specific pregnancy accommodation protection. Possible answers for a pregnancy accommodation law include updating the federal PDA or passing state laws in all fifty states. Benefits and challenges exist for both options. Through analysis of each and of the political climate, I recommend a model law to be adopted by all states as a best solution. With either option, a model law derived from the successful portions of current state laws could be used to create an applicable standard for which to strive.

This model provides a detailed law requiring reasonable accommodations to pregnant workers based on Chapter IV’s comparison of state laws. The model’s main components are detailed within the following paragraphs. Employers with at least one

employee regardless of hours worked or tenure at the company are required to provide pregnancy accommodations unless undue hardship exists. The employer and employee must engage in an interactive process of discussing and deciding on reasonable accommodations. In addition to these terms, the model contains explicit definitions and examples to further aid employers and employees in understanding and adhering to the law. Reasonable accommodations are defined as altering the way a job is customarily performed to allow an employee or potential employee to perform the job, and typical accommodations such as light duty assignments, more frequent or longer breaks, periodic rest, temporary transfers, modified work schedule, and job restructuring are provided as examples but not an exhaustive list.

Undue hardship refers to an action requiring significant difficulty or expense in reference to financial resources, size of business, type of operation, geographic separateness, and impact of accommodations, and it is the burden that employers must prove in court with pregnancy accommodation charges. Examples of undue hardship are included to provide information but do not serve as a complete list. The state and federal pregnancy accommodation laws must be posted in a main area of the business as well as given to all employees in an employee handbook. Employers cannot take adverse action against, deny opportunities to, force leave of, or require accommodation to a pregnant employee due to the need of reasonable accommodation. Employers may require the employee to present a physician's note detailing need for accommodations excluding more frequent restroom, food, or water breaks.

The creation of a model benefits both state and federal policy makers because it demonstrates the ideal law based on current legislation. It can be used to update weak

laws or create new laws at both levels of government. This model was created after examining all of the current state laws on pregnancy accommodations and closely resembles, but provides even more coverage than the proposed federal Pregnant Workers Fairness Act although it too was based on successful state laws.

The Pregnant Workers Fairness Act (PWFA), a proposed federal law intended to serve in addition to the Pregnancy Discrimination Act, was drafted and introduced to committees in both the House of Representatives and the Senate (H.R. 2417; S. 1101). Its goal of increasing pregnant women's rights in the work environment focuses on accommodations. It requires the EEOC to provide examples depicting reasonable accommodations which must be followed by employers with fifteen or more employees unless they can demonstrate doing so would impose an undue hardship. The law mandates the employee and employer engage in a timely, good faith, and interactive process to decide reasonable accommodations. It makes it unlawful for employers to deny employment opportunities, require acceptance of accommodations, force leave, or take adverse action due to a pregnant employee's request for an accommodation. Many legal scholars believe the Pregnant Workers Fairness Act would provide a good national standard because it eliminates much of the uncertainty surrounding the PDA's accommodation requirements and its language is derived from many of the state laws currently in effect (Chacko, 2017). Although the Pregnant Workers Fairness Act represents ideas expressed in state laws across the country, it has failed to make it out of committee in either the House or the Senate every session since 2011. This repeated lack of movement on the legislation can be attributed to the extreme partisanship of Congress rather than the lack of citizen support (Pisko, 2016). Senator Casey (D-PA), who

cosponsored the Senate bill, details its need for passage as, “women should not live in fear of losing their jobs or being forced on leave because they are pregnant” (Nadler, 2017). The PWFA is modeled after the ADA, and according to its sponsors, “this legislation will ensure women are offered real protection in the fight against pregnancy discrimination” (Nadler, 2017). The PWFA ultimately provides a good model, similar to the one created in this thesis, for enhancing the protections afforded to pregnant women in the workplace.

The goal of the PWFA is “to eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition” (Karsten, 2016). With this goal in mind, I believe the PWFA if passed would succeed in its intentions and benefit many women in the workplace. While respecting the efforts in creating it and the great effect the PWFA would have, I recommend a few changes. The changes I recommend include number of employees required for threshold, physician’s note requirement, and examples of accommodations. A business with one or more employee should be covered under the accommodation law in order to protect the maximum number of pregnant employees. The undue hardship exemption may be used by small businesses unable to provide accommodations. A physician’s note should be discussed in the federal law because it remains a common thread among many state laws, but I do not believe all pregnancy accommodations should require a physician’s note. Employers should be able to require the employee to present a physician’s note detailing need for accommodations excluding more frequent restroom, food, or water breaks. I also believe the addition of some

common specific pregnancy accommodations should be added to the federal law in order to provide guidance to employers. Although I support strengthening PWFA by altering it to include my recommendations it is more likely to be passed by members of both parties in its current form, and the recommendations I have made could be put forth by the EEOC rather than stated in the federal law. If the options are between passing current PWFA or no federal law, I would vote in favor of the PWFA despite my recommended changes.

The proposed federal law and my model federal law remain unfeasible due to extreme partisanship of Congress. The PWFA has yet to be voted on in either chamber since its first introduction in 2011. While some Republicans have supported the PWFA, it has been a mostly Democrat sponsored law, and the Democrats have not controlled both chambers during its existence (H.R. 2417; S. 1101). Some Republicans support companies' policies protecting women's opportunity in the workplace, especially related to having children. Yet they still believe these are matters "for private negotiation not public mandate," following the less government intervention argument and remain against the PWFA (McBride, 2016). One response to this argument is that private companies are more likely to have family friendly policies for higher earning workers and low income workers need protection through the law.

The United States Congress has been polarized for years due to the two party system of government leading to deep divides based on party lines. This partisanship divide has prevented the PWFA from passing through Congress despite its purpose of family friendly legislation benefiting all Americans. Burrell believes based on previous successes and the finding that "on average women sponsor and cosponsor more bills than

do men and are able to enlist more cosponsors,” women, as well as increased numbers of women in Congress, are more likely to lead to the passage of women’s rights laws (2017). A future, less divided Congress that prioritizes family issues may one day pass the PWFA, but currently the passage of a pregnancy accommodation law at the federal level remains unfeasible.

A possible alternative to a new federal law would be passage of accommodation laws in states without them and updates to the current accommodation laws failing to provide adequate protection. State statutes as described in the previous chapter offer guidelines for both employers and employees. Pisko determines that “accommodations are often low to no cost, create a positive work environment, avoid potential litigation, protect the health of workers, and reduce attrition rates” (2016). These and more benefits to both employers and employees through accommodation laws within states are already having positive effects. Because companies as well as their employees in states with pregnancy accommodation laws are giving positive feedback, more states should follow (Pisko, 2016). Since both liberal and conservative states have passed bipartisan laws detailing accommodations, more states may be able to follow the frameworks set forth by states with similar political leanings. For example, Mississippi could pass a law similar to Louisiana’s law. Although different requirements among the states create problems for transnational companies such as Walmart, passing state laws in all states remains the best option for timely increased protection. If the option of passing laws in all fifty states must be chosen, ideally the model proposed or the PWFA’s model should be used to pass the same law in every state. While this would not be easy, the Uniform Law Commission

often drafts model laws as recommendations to all states of new recommended standards and could recommend this model to be passed by every state.

To conclude, as Karsten states, “the piecemeal approach of legislation addressing pregnancy in the workplace results in such gaps and complicated workplace impasses” (2016). Currently, ineffective means address pregnancy accommodations, because “congress did not clarify the meaning of the PDA and, instead, left the courts to continue parsing the implications” (Karsten, 2016). The model law created follows the proposed Pregnant Workers Fairness Act with a few recommended changes, yet neither is currently feasible at the federal level due to polarization and other priorities. Another aspect slowing down national movements towards pregnancy accommodation is the different views among feminists on how to address the problem specifically whether pregnancy accommodations should be categorized as a disability under the ADA or given a law of its own. All women need a protective pregnancy accommodation law; therefore, the pregnancy accommodation model law should be adopted by all states updating insufficient state laws and providing laws for those without one. This adoption will codify the federal court’s practice of requiring what is done for temporarily disabled employees to be done for pregnant employees which will lead to a less subjective ruling in pregnancy accommodation cases and less cases overall.

Chapter VI: Conclusion

In the 2015 Supreme Court case of *Young v. UPS*, Supreme Court Justice Anthony Kennedy stated, “the difficulties pregnant women face in the workplace are and do remain an issue of national importance” (Karsten, 2016). His and many other well-respected people’s comments on the topic brought pregnancy accommodations and their importance into the national spotlight. Pregnancy accommodations have received increased attention since the early 2000s through high profile cases, enactment of laws on the state level, and proposals of law on the national level. Accommodation laws are especially important to low income pregnant workers who may need a chair to sit in, extra bathroom breaks, or lighter lifting assignments at work in order to keep their jobs during pregnancy. On a civil rights issue such as this, states should not be providing different protections. Cases are consistently filed by pregnant women denied accommodations such as job transfers, assistance in manual labor, and even the ability to carry a water bottle at work. These cases represent insufficient laws enforcing reasonable accommodations for pregnant women in addition to a lack of straightforward guidelines that both employer and employee understand. The 23 states with accommodation laws vary in their coverage and explicitness of application as seen through analysis in chapter IV. The major similarity among all but a few state statutes is the requirement for accommodations for pregnant women unless they pose undue hardship. They mostly differ in size of employer covered, definitions provided including the thoroughness of them, and whether a non-limiting list of accommodations is found in the law. Although

both conservative and liberal leaning states have passed accommodation laws unanimously or with bipartisan support, the majority of states remain without pregnancy accommodation statutes.

A federal law would be an ideal solution in combating the problem of unequal protections, because of its uniformity in mandating the same standards to all employers and ability to be treated and interpreted equally among all courts in the United States. However, the current congressional makeup has not allowed even a floor vote on pending legislation requiring workplace accommodations for pregnant women, so while legislation should still be pushed at the federal level, a more feasible course of action in 2019 is to advocate for increasing numbers of state laws. In addition to laws providing this protection in all fifty states, states with low standards such as only covering public employees should update their legislation to protect more pregnant women. The current states' statutes, while differing in many respects, have similarities which provide references for other states to follow in enacting their own laws. Through this comparison of state statutes, differences and similarities are seen and discussed in order to draft a model for future legislation protecting the civil rights of all pregnant women in the American workforce. The model created post analysis requires reasonable accommodations to pregnant workers with at least one employee unless undue hardship exists, where the employer and employee have engaged in an interactive process. In addition, the model contains explicit definitions and examples to further aid employers and employees in understanding and adhering to the law. By following this model states and possibly the federal government can put forth an effective solution to the public health and economic issue of pregnant women refused workplace accommodations.

This thesis examines the current situation of pregnancy accommodation laws by comparing them and explaining the effects of their language. Through analyzing the laws, I determined important points needed in all pregnancy accommodation laws. This research can help one understand the ways in which the laws differ and what those differences mean for employees and employers in those states. In addition, the current climate of congressional priorities on family issues, pregnancy discrimination in the workplace, and women's roles in careers are discussed to better understand the entire problem. The scope of this undergraduate research is limited to analyzing state and federal laws in conjunction with a literature review on related research by other scholars. Further research needs to be done on pregnancy accommodations until the needed laws are passed. Cases need to be reviewed in states with and without pregnancy accommodation laws in order to see their direct effects and compare how different aspects of the laws affect outcomes. More data collection on cases as well as interviews with employees and employers affected by pregnancy accommodation laws can influence politicians to pass a federal pregnancy accommodation law. Also as states update or create pregnancy accommodation laws, their laws should be added to the comparisons made in this thesis. Overall, this thesis adds a comparative discussion to pregnancy accommodation research by answering how current state statutes regarding pregnancy accommodations compare to one another and what policy recommendations can be derived from their comparison to better protect pregnant women in the workforce. Yet, more examination needs to be done in order to fully understand the evolving conditions surrounding pregnancy accommodations.

Legislation such as the Family and Medical Leave Act, Pregnancy Discrimination Act, and Title VII of the Civil Rights Act were created and became law in conjunction with women undertaking increasingly larger roles in the American workforce. In 2019, the circumstances surrounding pregnancy accommodations require the same level of federal legislative action. Women suffer wage loss, job loss, and discrimination while pregnant when having to choose between harmful circumstances for pregnancy or their job due to lack of adequate pregnancy accommodations. Employers and businesses also experience negative consequences such as the cost of lawsuits in terms of time and money and difficulty creating company policy due to insufficient laws at the federal level. Case numbers and personal stories demonstrate this problem. Twenty-three states and a few cities have passed pregnancy accommodation laws to combat the problem. Through comparing the current state laws, I explained the implications of their differences and derived a model law. Ideally, the model law will be passed at the federal level to provide a national standard. A federal pregnancy accommodation law remains unfeasible; therefore, I recommend the states all strive to adopt a uniform law to feasibly provide better protection to women in the workforce.

Appendix A								
Pregnancy Accommodation Laws								
State	Statute	Type of employer	Year Passed	Ease of Passage (if known)	Requires Reasonable Accommodations	Unless Undue Hardship	Employer May Require Physician's Note	Interactive Process Required
Alaska	Alaska Stat. § 39.20.520 (2013)	All public employers	2013				x	
California	Cal. Code Regs. tit.2, § 11049 (2013); Cal. Gov't Code §§ 12945, 12926 (West 2012)	5 or more employees	2012		x	x	x	
Colorado	Colo. Rev. Stat. §§ 24-34-401, 24-34-402.3 (2016); Colo. Rev. Stat. § 24-34-401 (2016)	All employers	2016		x	x	x	x
Connecticut	Conn. Gen. Stat. §§ 46a-60(a)(7), 46a-51 (2011)	3 or more employees	2011		x	x		
Delaware	Del. Code tit. 19, §§ 710, 711, 716 (2014)	4 or more employees	2014	unanimous	x	x		
Washington, D.C.	Protecting Pregnant Workers Fairness Act of 2014, D.C. Act. 20-458 (2014)	All employers	2014	unanimous	x	x	x	x
Hawaii	Haw. Code R. § 12-46-107 (1990)	All employers	1990		x			
Illinois	775 Ill. Comp. Stat. 5/2-101, 102 (2014)	All employers	2014	unanimous	x	x	x	x
Louisiana	La. Rev. Stat. §§ 23:342, 23-341 (1997)	25 or more employees	1997				x	
Maryland	Md. Code, State Gov't §§ 20-609, 20-601 (2013)	15 or more employees	2013	passed with bipartisan support	x	x	x	
Massachusetts	Mass. Gen. Laws ch. 151B, § 4(1E) (2017); Mass. Gen. Laws ch. 151B, § 1 (2017)	6 or more employees	2017		x	x	x	x
Minnesota	Minn. Stat. §§ 181.940, 181.9414, 181.9436 (2014)	21 or more employees	2014	passed with bipartisan support	x	x	x	x
Nebraska	Neb. Rev. Stat. §§ 48-1107.01(2), 48-1107.02(1)(e) (2015); Neb. Rev. Stat. § 48-1121 (2015); Neb. Rev. Stat. § 48-1102 (2015)	15 or more employees	2015	no dissenting votes	x	x	x	
Nevada	Nev. Rev. Stat. §§ 613.335 et seq. (2017)	15 or more employees	2017		x	x	x	x
New Jersey	N.J. Stat. § 10:5-12(s) (2013); N.J. Admin. Code § 13:8-1.2 (2006); N.J. Stat. Ann. § 10:5-5 (2010)	All employers	2014	one dissenting vote	x	x	x	
New York	N.Y. Exec. Law §§ 292, 296 (2015); N.Y. Comp. Codes R. & Regs. tit. 9, §§ 466.1(a), (b) (2015); N.Y. Exec. Law §§ 292(5), (6) (2015)	4 or more employees	2015	no dissenting votes	x	x		
North Dakota	N.D. Cent. Code § 14-02.4-03(2) (2015); N.D. Cent. Code §§ 14-02.4-02(8), (7) (2015)	All employers	2015	one dissenting vote	x	x		
Rhode Island	R.I. Gen. Laws §§ 28-5-7.4(a)(1), (3), (2), (4) (2015); R.I. Gen. Laws §§ 28-5-6(8)(i), (7) (2015)	4 or more employees	2015	no dissenting votes	x	x		
South Carolina	S.C. Code Ann. § 1-13-80(A) (2018); S.C. Code Ann. § 1-13-30(e)	15 or more employees	2018		x	x		
Texas	Tex. Loc. Gov't Code § 180.004 (2001)	All public employers	2001		x		x	
Utah	Utah Code §§ 34A-5-106(1)(g), (7) (2016); Utah Code §§ 34A-5-102(i), (h) (2015)	15 or more employees	2016	passed with bipartisan support	x	x	/	
Vermont	21 V.S.A. § 495k (2017); 21 V.S.A. § 495d(1) (2017)	15 or more employees	2017		x	x		
Washington	43.70 RCW (2017)	15 or more employees	2017		x	x	/	
West Virginia	W. Va. Code §§ 5-11b-1, et seq. (2014); W. Va. Code § 5-11-3(d) (1998)	12 or more employees	2014	unanimous	x	x	x	
/ allowed for some but not all accommodation request								

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